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IN THE

Supreme Court of The United States

October Term, 1974

NO. 73-1103

PHILIP JAMES GRAZIANI,
Petitioner,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on December 17, 1973.

OPINION BELOW

The opinion below was rendered, in a disciplinary proceeding, by the Supreme Court of Appeals of West Virginia and the case is unofficially reported in 200 S. E. 2d 353. Both the order denying the petition for

appeal and the order denying a rehearing, together with the opinion in the original appeal, are set forth in full in the Appendix herein.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on December 17, 1973, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether the Court below violated petitioner's federal constitutional right to due process by finding the petitioner guilty of bribery and conspiracy on the sole basis of his immunized grand jury testimony and, further, by allowing such compelled testimony to be used against petitioner as the sole grounds for disbarment.

2. Whether compelled testimony, by an attorney-witness before a grand jury, can be used against him as the sole basis of a disbarment proceeding, notwithstanding a court ordered grant of full and complete immunity applying to any proceeding against such attorney thus violating his right against self-incrimination.

3. Whether a disbarment proceeding poses sufficient threat of forfeitures and penalties to be one of those types of proceedings against a person contemplated by the grant of full immunity necessarily required to satisfy the broad protections of the Fifth Amendment right against self incrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

"No person . . . shall be compelled in any criminal case to be a witness against himself."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . . to be confronted with the witnesses against him".

Ninth Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

West Virginia Statutes

Chapter 57, Article 5, Section 1, West Virginia Code, 1931, as amended.

"In any criminal proceeding no person shall be excused from testifying or from producing documentary or other evidence upon the ground that such testimony or evidence may criminate or tend to criminate him, if the court in which he is examined is of the opinon that the ends of

justice may be promoted by compelling such testimony or evidence. And if, but for this section, the person would have been excused from so testifying or from producing such evidence, then if the person is so compelled to testify or produce other evidence and if such testimony or evidence is self-criminating, such self-criminating testimony or evidence shall not be used or receivable in evidence against him in any proceeding taken against him thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence shall not be prosecuted for the offense in regard to which he is so compelled to testify or furnish evidence, and he shall have complete legal immunity in regard thereto."

STATEMENT OF THE CASE

On November 20, 1973, the West Virginia Supreme Court of Appeals issued its opinion, upon the petition of the respondent, the Committee on Legal Ethics of the West Virginia State Bar, annulling petitioner's license to practice law in the State of West Virginia. The opinion basically held that the testimony of the petitioner given before a grand jury under a grant of immunity could be used against him in a disbarment proceeding.

Thereafter, petitioner applied for a rehearing. On December 17, 1973 the petition for rehearing was denied, the record in the case at bar discloses the following facts:

In the months of November and December, 1969, petitioner had conferences with Patrick Casey, the Prosecuting Attorney for Kanawha County, West Virginia, Charles L. Hughes, who was a member of the

Department of Public Safety of West Virginia, and John T. Coyne, Chief Investigative Attorney for the Purchasing Practices and Procedures committee of the State of West Virginia.

During such conferences petitioner volunteered to furnish information that would aid and assist the State of West Virginia and the United States Government authorities in investigations concerning possible charges against certain officials. Definite promises were made to the petitioner by Mr. Casey as well as Mr. Hughes and Mr. Coyne that nothing said or furnished of any evidentiary nature by the petitioner would be used against the petitioner *in any shape or form.* Also during these conferences assurances were made to the petitioner that he would be given immunity by the Intermediate Court of Kanawha County, West Virgnia, with respect to such information and was further assured that no evidentiary matters traceable to any statements or evidence given by the defendant would be held against him.

Assurances were specifically made to Mr. Graziani that *no penalty or forfeiture or civil obligations would arise by reason of the information furnished by him.* (Emphasis supplied).

On December 10, 1969, the petitioner was summoned to appear before the Grand Jury of Kanawha County, West Virginia, and was compelled to give evidence after the court signed and entered an order granting petitioner immunity. The pertinent part of this order is as follows:

> "And it is further ORDERED that the said Philp Graziani shall have complete legal immunity in regards thereto as the law provides

and *said Philip Graziani is hereby granted full and complete immunity from prosecution under Federal or State laws* insofar as the matter being investigated by said grand jury are concerned, and insofar as any testimony he gives incriminates or tends to incriminate said Philip Graziani, and it is further ORDERED that as a result of such testimony and/or production of records *said Philip Graziani shall not be prosecuted or subjected to any penalties or forfeiture* for on account of any transaction, matter or thing concerning which he is compelled to testify *and said testimony shall not be used as evidence in any proceedings against the said Philip Graziani in any Court either State, Federal or otherwise.*" (Appendix D) (Emphasis supplied).

Thereafter, the respondent herein filed a petition in the United States District Court for the Southern District of West Virginia requesting the Court to authorize the testimony of the petitioner and Arthur J. Tarley given before a Federal Grand Jury in 1971, be disclosed to the respondent. Respondent allegedly desired such testimony as it related to possible incriminating evidence against the petitioner herein, for the "purposes preliminary to disbarment proceedings to be instituted against the said Philip James Graziani." (Committee Exhibit 2 in the Disciplinary Proceedings). In the answer to this petition petitioner alleged his immunity granted by the Intermediate Court of Kanawha County and further averred that "under the circumstances herein involved petitioner (complainant) is not entitled to the grand jury minutes as requested in that granting said relief would violate the constitutional rights of respondent (defendant)." (Answer to Petition in Federal Proceeding).

By order dated March 16, 1973, the United States District Judge ordered the United States District Attorney for the Southern District of West Virginia to disclose and make available to respondent the requested federal grand jury testimony.

At the subsequent disciplinary proceedings, held on May 3, 1973, no evidence was taken on behalf of the defendant for two reasons: First, petitioner's counsel was assured by the Chairman of the Legal Ethics Committee, that the respondent intended to rely solely upon the federal grand jury testimony, and secondly, in view of that assurance, defendant only specially appeared at the disciplinary proceeding in order to object to the constitutional violations involved in the proceedings. A special appearance and decision not to introduce evidence by the petitioner was a course taken to avoid any possible implications or conclusions that the petitioner had waived any constitutional errors incurred by the illegal use of the grand jury testimony by complainant. (Motion and Answer of Ethics Committee in Federal Petition; Disciplinary Hearing Transcript, pp. 7, 8).

There is and was no issue of fact as to whether or not the respondent used petitioner's compelled grand jury testimony against him in a disciplinary proceeding.

Thereafter, in July, 1973, respondent, based solely upon the evidence obtained in the grand jury minutes, instituted a disciplinary proceeding, in the Supreme Court of Appeals of West Virginia, seeking to annul petitioner's license to practice law. The petitioner, at that proceeding, continued to assert the basic defense of constitutional immunity against any proceeding

against him based upon compelled testimony. Petitioner has at no point, in his long, arduous assertion of Fifth Amendment rights, retreated from the position that the respondent was constitutionally barred from taking the actions it did. As stated earlier, the court below did, in fact, annul the petitioner's license to practice law finding him "guilty of bribery and conspiracy to commit bribery" (Appendix, A-12.) even though petitioner has never been charged nor convicted for any crime whatsoever.

Finally, the record below contains certain affidavits, of various federal and state law enforcement officials, which state clearly the broad grant of immunity herein. These affidavits are set forth in the Appendix and will be referred to in the following portion of this petition.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Erroneously Concluded that the Petitioner was Guilty of Bribery and Conspiracy to Commit Bribery on the Basis of Petitioner's Immunized Grand Jury Testimony and Then Utilized this Finding to Justify Disbarment Although Petitioner Has Never Been Charged or Tried for Such offenses.

On Page 10 of the opinion below the Court held as follows:

> "The testimony before the federal grand jury which is made a part of the record in this proceeding clearly shows that *the defendant was guilty of bribery and conspiracy to commit bribery.* It has repeatedly been held that such crimes are crimes that involve moral turpitude

> *which warrant the disbarment of any attorney guilty of such crimes. . . . Thus, the testimony of the defendant in this case before the grand jury amounts to a confession of guilt of a crime . . .*" (Appendix A-12) (Emphasis supplied).

Petitioner has never been charged, indicted or tried for the alleged offenses stated in the court's findings. The court below has summarily declared petitioner guilty of a felony in utter disregard of federally protected rights to confrontation of witnesses, to offer evidence on one's own behalf, to trial by jury and, most pointedly, the right against self incrimination.[1]

Applying the basic premise that due process embodies and contemplates the basic rudiments of fair play, *Hannah v. Larche*, 363 U. S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), we find that petitioner was denied even the semblance of justice.

The uncontroverted evidence in this case is that Philip J. Graziani was summoned to appear before the Kanawha County Grand Jury on December 10, 1969, after entry of an order which reads, in pertinent part, as follows:

> "*. . . it is further* ORDERED *that as a result of such testimony and/or production of records said Philip Graziani shall not be prosecuted or subjected to any penalties or forfeiture for on*

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[1]The Supreme Court of Appeals below based its finding primarily upon the 1917 case of *In Re Ronan*, 221 N. Y. 81, 116 N. E. 782. As will be discussed more fully herein in the *Ronan* case was decided long before the modern cases of *Spevak v. Klein*, 385 U. S. 511, 87 S. Ct. 625 (1967) and *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222 (1968). *Ronan* does not contemplate the modern view that Fifth Amendment protections apply to disciplinary proceedings.

> account of any transaction, matter or thing concerning which he is compelled to testify and *said testimony shall not be used as evidence in any proceedings against the said Philip Graziani in any Court either State, Federal or otherwise.*" (Emphasis supplied).

This order was predicated, *inter alia*, upon West Virginia Code, 57-5-2, as amended, which provides, in part, that:

> ". . . self-criminating testimony or evidence shall not be used or receivable in evidence against him *in any proceeding* thereafter taking place . . . and he shall have *complete legal immunity* in regard thereto." (Emphasis supplied).

West Virginia Code, 57-5-2, as amended, is the immunity statute in West Virginia and by its own terms offers a rather broad[2] complete protection consistent with Fifth Amendment requirements. The pertinent part of that section follows:

> ". . . such self-criminating testimony or evidence shall not be used or *receivable in evidence against him in any proceeding taken against him* thereafter taking place other than a prosecution for perjury in the giving of such evidence, and the person so compelled to testify or furnish evidence, *and he shall have complete legal immunity in regard thereto.*" (Emphasis supplied).

The West Virginia immunity statute has been unreasonably restricted in the case at bar and fails to

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[2]The West Virginia Supreme Court of Appeals illogically noted that Code, 57-5-2, is narrower than most states' immunity statutes in spite of the West Virginia language prohibiting "any proceeding".

give petitioner the required protections coextensive with the Fifth Amendment as mandated in the cases of *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892) and recently in *Kastigar* v. *U. S.*, 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Also, in light of the broad immunity grant by the statute together with assurances and promises made by various officials (Appendix E) it becomes clear that the petitioner was "trapped" into believing he enjoyed a privilege which, in fact, he did not receive.[3]

2.

Although the Court Below Conceded that the Federal Grand Jury Testimony was Entitled to the Same Type of Immunity as that Extended by the State, the Court Below Did Not Resolve the Federal Constitutional Questions Raised by the Petitioner in the Federal Court Proceeding, the Ethics Committee Proceeding and the Supreme Court of Appeals Hearing and thus Shifted the Burden of Proving his "Innocence" to the Petitioner Thereby Relieving the Respondent of its Legal Burden.

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[3]Attention is drawn to the following excerpts from various law enforcement officials' affidavits concerning their intended grant of immunity herein: (These affidavits are set forth in full in Appendix E.) ". . . nothing Mr. Graziani might say in an attempt to cooperate . . . would be used to harm him in any way, whether by means of state criminal prosecution, federal criminal prosecution, or other administrative action . . ." (Appendix, A-19). ". . . Definite promises were made to Mr. Graziani by the undersigned (prosecuting attorney) . . . that nothing said or furnished of any evidentiary nature by Mr. Graziani concerning state or United States crimes would be used against Mr. Graziani in any way, shape or form . . . That . . . no penalty or forfeiture or civil obligations would arise . . ." (Appendix, A-16, A-17).

The basic issue raised herein was initially raised in the Federal court proceeding instituted by the Ethics Committee to obtain the grand jury testimony of Philip Graziani, thereafter preserved in the Committee hearing via a motion to dismiss the proceedings and ultimately in the Court below in the answer and briefs filed on behalf of the petitioner. Stated briefly, the issue is whether a grant of compelled testimony immunity which, at the time it was granted, ostensibly included immunity from administrative proceedings based upon the same testimony would continue to render the recipient thereof immune in a subsequent disciplinary proceeding.

Although the only evidence used against Phil Graziani in the disciplinary proceeding was his own testimony given before the federal grand jury, as well as the testimony of Arthur J. Tarley, despite assurances that the Committee would consider only the testimony of Philip Graziani, it is uncontroverted that the federal grand jury testimony was given under the same grant of immunity and assurances made by the State officials.[4]

At page 7 of the opinion below, the Court, in stating that testimony given under a grant of immunity could be used in disbarment proceeding cited, *inter alia*, *The Florida Bar* v. *Massfeller*, (Fla.) 170 So. 2d 834, and further cited from the case at length on page 8 of the opinion.

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[4]There appears to be no disagreement that the State immunity extended to the federal proceedings as reflected by the State Court's adherence to *Murphy* v. *Waterfront Commission*, 378 U. S. 52, at page 10 of the opinion below. (Appendix, A-12).

While the instant case was pending in the Court below for decison the Florida Supreme Court decided the case of *State ex rel. Vining* v. *Florida Real Estate Commission*, 281, So. 2d 487, decided April 4, 1973, rehearing denied September 12, 1973. In that case a real estate broker was charged by the Florida Real Estate Commission with violations of the Real Estate License Law.[5] Under protest and not waiving any of his constitutional rights, Vining filed a sworn answer denying the charges as required by Florida Law and moved to quash the information, which was denied.

Vining then instituted a prohibition proceeding in the Florida Supreme Court attacking the statute requiring the filing of a sworn answer on the basis of the Fifth Amendment to the United States Constitution. The Real Estate Commission defended on the basis that the statute had been upheld in recent Florida cases in which the Court characterized the proceedings as "administrative" and not "criminal". However, the Court, at page 489 of the opinion, noted that the Fifth Amendment rights had been extended to proceedings "penal" in nature whether classified in the traditional sense or not, thereby bringing the reasoning of the earlier Florida cases into question. The Court, in granting the writ of prohibition, at page 491, stated:

> ". . . In succinct terms, it is our view that the right to remain silent applies not only to the traditional criminal case, but also to proceedings 'penal' in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood . . ."

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[5]The charges would have presumably subjected the licensee to criminal action in addition to serving as the basis of the disciplinary proceeding.

Thereafter, on October 10, 1973, the Florida Supreme Court decided the case of *Lurie* v. *Florida State Board of Dentistry*, 288 So.2d 223 (1973), rehearing denied February, 1974, which is directly in point. There Lurie, a dentist, was compelled to testify before a county grand jury in 1967 regarding alleged illegal transactions between himself and one Rosenbaum. The interrogation of Lurie not only involved charges which were then pending against Rosenbaum but also involved matters relating to the operation of a stolen car ring and Lurie's acquisition of two automobiles from Rosenbaum. One year later Lurie was charged in a criminal information and sought and was granted a writ of prohibition contending that he was " . . . immune from prosecution under section 932.29, F. S. 1967, which provided that a person could not be excused from testifying in certain prosecutions on the ground he might incriminate himself, but when he did so testify he could not be prosecuted or subjected to any penalty or forfeiture for on account of any transaction, matter or thing concerning which he may so testify . . ."[8]

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[8]The Court in *Lurie* also noted that while the prohibition case was pending, the Supreme Court, in *Headley* v. *Baron*, 228 So. 2d 281 overruled *Florida State Board of Architecture* v. *Seymour*, 62 So. 2d 1, which held that the statutory immunity from subjection to 'any penalty or forfeiture', was not limited to criminal prosecutions, but also provided immunity from revocation of professional license proceedings; that *Headley* had held that 'penalty or forfeiture' referred only to a criminal penalty and could not be used to immunize one against loss of a professional license in an administrative proceeding as a result of grand jury testimony.

On June 22, 1971, the Board of Dentistry filed a two count accusation against Lurie charging him with willful negligence and malpractice in the removal of a tooth and conspiracy and concealment of stolen cars. As here, Lurie filed a motion to dismiss contending, *inter alia*, that he was fully immune from any penalty or forfeiture for his alleged stolen car actions because of Section 932.29 and the mandate of the Intermediate Court of Appeals in the previous prohibition proceeding. The Board found Lurie guilty as charged and on August 21, 1971, revoked his license for one year on the malpractice charge and permanently on the concealing stolen automobile charge. Petitioner filed a petition for writ of certiorari with the District Court of Appeals which, in a per curiam decision without opinion, denied the petition on June 30, 1972. The Florida Supreme Court granted the petition for writ of certiorari on the basis of a conflict in cases dealing with the retrospective effect of case law.[7] However, in the process, the Court made the following significant observations:

> "We have re-examined the cases of *Headley* v. *Baron*, supra, and *Florida State Board of Architecture* v. *Seymour*, supra, in the light of the weight of judicial authority throughout the nation on the question of citizens' immunities from the imposition of penalties and forfeiture in administrative proceedings where they are compelled to testify before grand juries, prose-

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[7]The Court specifically noted, however, that the decision in *Lurie* rested ". . . not on retroactivity, but on reinstatement of the holding in *Seymour* and freely acknowledged that its "erroneous decision in (the Headley case) generated the related action below."

> cuting officers, or courts concerning matters or things which might incriminate them. We are convinced now that this Court was in error in overruling *Florida State Board of Architecture* v. *Seymour, supra.*" (Citing authorities).
>
> "Where testimony is so compelled the person (witness) testifying should have the benefit of immunity statutes or other protections afforded by law. As Justice Terrell pointed out in the *Seymour* case, the guarantee must be as broad as the constitutional guaranty. He also said for the *Seymour* court, 'a forfeiture is also a penalty and has to do with the loss of property, position or some other personal right' and, 'It is accordingly our view that a proceeding to revoke Appellee's certificate as an architect amounts to a prosecution to effect a penalty or forfeiture as contemplated by the (statute) . . .' "[8] (Emphasis in orignal).

The Court further observed that the immunity extended under Section 932.29 F. S. 1967 in surrender of the Fifth Amendment privilege was not " . . . divisible so that the prosecution vouchsafed thereunder is only from criminal prosecution . . ."[9] and again alluded to the *Seymour* opinion stating that:

> " '. . . Whether the prosecution penalty or forfeiture has to do with a civil or criminal

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[8]The Court also referred to *State ex rel. Vining* v. *Florida Real Estate Commisison*, 281 So. 2d 487, *supra.*

[9]The Court noted that the result could be ascertained from a cursory reading of the statute that ". . . *no person shall be* prosecuted or *subjected to any penalty or forfeiture* for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and *no testimony* so given or produced *shall be received against him upon any criminal investigation or proceeding.*" (Court's emphasis).

action is not material. The statute (932.29, F. S.) makes it applicable to both.' "

The Court continued:

> "Such an interpretation is not a strained construction of the legislature's enactment, but rather one which comports realistically and and honestly with the professed immunity grant. The State through its authorized officials in granting immunity to a witness acts totally for the State, including its licensing agencies. A professional state licensing board must respect the immunity granted similarly as must the prosecuting attorney. *To be efficacious in securing testimony of a citizen the immunity extended must be coextensive with all possible governmental penalties and forfeitures, criminal or civil. Persons holding professional licenses cannot be excepted from total immunity protection.*"[10] (Emphasis Supplied).

Quite apart from the application of the statute, the Florida Court also made the highly pertinent observation that:

> "Fifth Amendment freedoms are never lightly surrendered. Consequently, the state on its

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[10]This, of course, reflects the logic of *Spevak* v. *Klein*, 385 U. S. 511 (1967), where the Court noted that the United States Supreme Court had always accorded the privilege a liberal construction and that lawyers were not excepted therefrom; that ". . . lawyers also enjoy first-class citizenship" Id. 385 U. S. 511, at 516. Cf, the Court's opinion herein that *Spevak* merely held that an attorney could not be disbarred for refusing to produce documents. The Florida court, however, was of the opinion that *Spevak* meant much more.

> part should not be technically 'sharp' or narrow in honoring its immunity commitment. When it professes to extend total immunity by statute its judiciary should not circumscribe or hedge or renege in part its solemn promise with exceptions permitting imposition of certain penalties and forfeitures in adminstrative proceedings. To do so would not only debiltate the effectiveness of the immunity grant; it would also invariably serve to engender distrust for a state officer's promise. *Fundamental fairness dictates an open and aboveboard agreement between both parties, the state and the witness. No hypocrisy or pretense can be indulged in by the state to break so solemn a pledge when a witness is compelled to testify.*" (Emphasis supplied).

Applied to the instant case, it is not possible to distinguish or otherwise diminish the far-reaching effect of the *Lurie* case from the instant case. First, it must be emphasized that West Virginia Code, 57-5-2, is broad in granting immunity and preventing use of incriminating testimony ". . . in any proceeding taken . . ." and bestowing ". . . complete legal immunity in regard thereto." It is apparent that Code, 57-5-2, when given its "plain meaning" application, is more comprehensive than the Florida statute. Second, any deficiency in the statutory grant was undoubtedly supplied by the order of the Intermediate Court to the effect that Philip Graziani ". . . shall not be prosecuted or subjected to any penalties or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify and said testimony shall not be used as evidence in any proceeding against the said Philip Graziani in any Court

either State, Federal or otherwise".[11] (Appendix, A-15). Moreover, the opinion of the court below did not discuss the uncontroverted evidence of the investigatory and prosecutorial officers to the effect that nothing that Philip Graziani said ". . . would be used to harm him in any way, whether by means of state criminal prosecution, federal criminal prosecution or other administrative action . . .";[12] that nothing would be used in any way, shape or form and particularly no penalty or forfeiture or civil obligations would arise;[13] that nothing furnished would be used in any manner whatsoever and for any purpose;[14] etc. If for no other reason a writ should be granted in this case as a guideline for both law enforcement officials and lawyers representing professional and/or persons engaged in licensed occupations inasmuch as the decison herein has generated much confusion and frustration.[15]

It is also interesting to note that the dissenting judges in *Lurie* would apply the rationale of the Court's opinion in the instant case, i.e., lack of a

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[11]To further compound the injustice, the Ethics Committee allegedly relied solely upon the testimony of Phillip Graziani and admitted that it would not have had sufficient evidence to carry the burden of proving the charges in absence thereof. Adding thereto was the lower Court's conclusion that his testimony "clearly" showed that he ". . . was guilty of bribery and conspiracy to commit bribery", without benefit of trial by jury, confrontation, etc. (Appendix, A-12).

[12]Affidavit of John T. Coyne; Appendix A-19.

[13]Affidavit of Patrick Casey; Appendix A-16.

[14]Affidavit of Charles L. Hughes; Appendix A-22.

[15]Counsel for defendant herein has had several inquiries both from law enforcement officials and attorneys representing licensed persons since the release of this opinion.

vested right to practice a profession and an unyielding commitment to the proposition that immunity statutes apply solely to crimnal proceedings.[16] However, the majority, although not unaware of such authority, chose instead to apply the logic supported by the "weight of judicial authority throughout the nation" and candidly acknowledged the error in previous Florida cases decided contrary thereto. As pointed out in petitioner's argument below, the cases relied upon by the Committee and thereafter incorporated into the Court's opinion were antiquated and predicated upon the erroneous concept that a license to practice law was a mere "privilege" to which no constitutional guarantees applied.[17] Moreover, *In re Schwary* 51 Ill. 2d 334, 282 N. E. 2d 689 (1972), the only significant case of recent vintage cited in the Court's opinon below, is clearly distinguishable on the basis that the Illinois statute specifically granted immunity from *prosecution* as contrasted with Code, 57-5-2; and that Schwary's *trial* testimony was used against him.

It is respectfully submitted that the court below in its opinion, did not resolve the critical constitutional questions posed in the numerous federal cases cited by the petitioner which, as noted in *Lurie*, are ". . . never lightly surrendered." The instant case is of

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[16]In fact, the dissent devoted over three pages to *In re Rouss*, 221 N. Y. 81, 116 N. E. 782, which this Court also relied upon heavily in its opinion, at pages 7 and 10. The dissent was also concerned with the effect of the decision on the the Watergate situation.

[17]The dissent in *Lurie* quoted extensively from *In re Rouss*, *supra*, specifically noting that Justice Cardoza was of the opinion that ". . . there was no question of constitutional right . . ."

sufficient magnitude to require a more definitive exposition of these critical questions which, as observed by the dissent in *Lurie* " . . . in the shadow of Watergate . . . present . . . implications and consequences . . . impossible to calculate . . ." Surely, the quoted language of *In re Rouss, supra*, contained in the opinion below at page 7 that " . . . we will not declare, unless driven to it by sheer necessity, that a confessed criminal has been untrenched by the very confession of his guilt beyond the power of removal (from the Bar)" could not withstand scrutiny under the holdings of the United States Supreme Court and the better reasoned opinions such as *Lurie, supra.* Any fears which might influence a decison to the contrary were met and resolved in *Lurie* as follows:

> "There are those who would hyperbolically parade the horribles of felons disguised as physicians or lawyers preying on unsuspecting patients or clients under a cloak of governmental immunity. Such feared abuses and evils ordinarily never transpire because prosecuting officers exercise reasonable discrimination in granting statutory immunity. A certain degree of confidence must be placed in state attorneys and other officials by assuming they will not recklessly grant immunity to the extent of opening floodgates for great numbers of the unscrupulous to professionally victimize the public. *It is to be assumed that such officials will act so as to use this bargaining tool to the state's greatest advantage without appreciable victimization to the public. Were we to judicially narrow the scope of immunity, we would emasculate that advantage at a far greater expense to the citizenry than would otherwise occur — and in the process raise serious doubts*

as to the state's good faith."[18] (Emphasis Supplied).

Significant also to a proper disposition of the instant question is *Lefkowitz* v. *Turley*, decided by the United States Supreme Court on November 19, 1973, the full text of which is reported in 94 S.Ct. 316, ... U.S. ....., (1973). In that case two architects licensed by the State of New York were summoned to testify before a grand jury investigating various charges of conspiracy, bribery and larceny. They refused to sign wavers of immunity and were excused. The District Attorney, as directed by law, notified various contracting authorities of their conduct calling attention to the disqualification statutes[19] and the architects instituted a proceeding asserting that the

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[18]As noted in the affidavit of John T. Coyne (Appendix, A-19) the evidence involved was given for the purpose of clearing up a situation that was destructive of the entire federal housing program in West Virginia; that ". . . this situation was not only not known but not even suspected at the time and but for Mr. Graziani's help it might still exist." See also, The Charleston Gazette, December 2, 1973, page 15-A, titled "Crackdown on Crime in FHA Working" under the by-line of Orr Kelly of the Washington Star News. The story noted that the "crackdown" has not only resulted in the indictment of 305 persons and 107 convictions, including James F. Haught, but also set a new and highly successful pattern for efforts to deal with similar white-collar crime in other federal programs, as reported by Justice Department officials. The dates in the article coincide with defendant's testimony herein and it is reasonable to assume that his testimony played a vital role in the "crackdown."

[19]New York Municipal law and Public Authority law required a clause in all contracts providing that upon refusal to sign a waiver the person would be disqualified from bidding, etc., on municipal contracts for five years and for cancellation of contracts.

provisions were violative of the Fifth Amendment. A three-judge court declared the provisions unconstitutional and the State appealed. The United States Supreme Court affirmed the judgment of the District Court.

In so doing the Court reiterated the traditional effect of the Fifth Amendment adding that:

> ". . . In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected *at least* against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant . . ." (Emphasis supplied).

The Court continued:

> "Against this background, there is no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises, as it does here, in the context of official inquiries into the job performance of a public contractor . . ."
>
> "It is true that the State has a strong, legitimate interest in maintaining the integrity of its civil service and of its transactions with independent contractors furnishing a wide range of goods and services; and New York would have it that this interest is sufficiently strong to override the privilege. The suggestion is that the State should be able to interrogate employees and contractors about their job performance without regard to the Fifth Amendment, discharge those who refuse to answer or to waive the privilege by waiving the

> immunity they would otherwise be entitled to and to use any incriminating answer obtained in subsequent criminal prosecutions. *But claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well.*" (Emphasis supplied).

In the context of the gravity of the question involved herein it is also clear that the State, by and through the Ethics Committee and the court below, has an interest in the regulation of the practice of law and the qualifications of the members of the profession.[20] This interest, however, cannot be utilized to justify the action of the respondent in this case. Surely, in spite of any statutory interpretation involved herein, the Committee was bound by the order of the Intermediate Court of Kanawha County granting *complete* immunity to Philip Graziani and the uncontroverted assurances of state officials, which obviously affected the Committee's decision not to attempt to obtain the state grand jury testimony on the basis of an overriding interest but to pursue the federal grand jury testimony instead, which was given, however, under the same conditions. As noted in *Lurie*, *supra*, the State should not be technically "sharp" or narrow in honoring its immunity commitment as was done in the instant case. The basic unfairness becomes more apparant by noting that the "investigation" of the defendant could have been pursued in directions other than perhaps the most "expeditious" one of obtaining and relying solely upon the testimony of the defendant

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[20]Cf. *In re Griffiths*, 413 U. S. 717 (1973).

himself.[21] The actions employed in the instant case has and will generate much distrust in the functioning of law enforcement in general and will undoubtedly prompt many professional and other licensed persons to refuse to cooperate in any manner whatsoever at so costly a consequence.

3.

The Court Below Misconstrued the Petitioner's Contention to be that a Disbarment Proceeding Was Purely a "Criminal" Proceeding and Ostensibly Did Not Consider the Alternative Contentions Supported by a Number of Cases Cited by Petitioner that it is Not Necessary to Characterize the Nature of the Proceeding But to Look to the Effect Thereof when Determining the Applicability of the Constitutional Right Against Self-Incrimination.

The third point petitioner brings to the attention of this Court regards the nature of the consequences of disciplinary proceedings as they relate to immunity statutes. Therefore, assuming, *arguendo*, that immunity applies only to criminal proceedings against a person who has been compelled to testify, it is still logical to treat disbarments and disciplinary proceedings as criminal in nature for the purposes of applying a grant of immunity.

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[21]Throughout these protracted proceedings counsel for petitioner has been unable to obtain a plausible response to why the principals involved could not have been used by the Committee especially in view of the obvious rapport with the federal officials.

A disbarment, although designed to protect the public, is a punishment or penalty to be imposed upon the lawyer and, ". . . is of a criminal or quasi-criminal nature". *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *In re Ming*, 469 F. 2d 1352 (7th Cir. 1972); *Erdman* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972).

In re Ruffalo involved various procedural due process violations during a state disbarment proceeding. The Supreme Court of the United States applied basic due process requirements to disbarments. *Ruffalo* had been charged with misconduct in his handling of Federal Employee's Liability Act cases. During the state disbarment hearing a new charge of misconduct was levied against Ruffalo, a charge based upon the testimony of a State Board's witness. The issue finally narrowed down to one concerning the defendant's constitutional right to notice of the charge and a hearing. The United States Supreme Court, in reversing defendant's disbarment, strongly stated that the defendant not only had a right to due process but also was to be afforded the constitutional rights as was any other defendant. Note the following language in *Ruffalo*:

> "*. . . Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process . . . These are adversary proceedings of a quasi-criminal nature* . . . The charge must be known before the proceedings commence. They became a trap when, after they are underway, the charges are amended on the basis of testimony of the accused . . . " (Citing *Ex parte Garland*, 4 Wall. 333, 380; *In re Oliver*, 333 U. S. 257, 273). (Emphasis supplied).

Cf. *In re Donegan*, 282 N. Y. 285, 26 N. E. 2d 260 (1940); *Furman* v. *State Bar of California*, 12 Cal. 2d 212, 82 P. 2d 12, (1938).

By no means is *Ruffalo* a restricted opinion confined to its own circumstances. The *Ruffalo* case has been cited numerous times in both federal and state court cases dealing with the nature of disciplinary proceedings and the constitutional guarantees afforded a defendant in such hearings. See, e.g., *In re Ming*, 469, F. 2d 1352 (7th Cir. 1972); *In re Fleck*, 419 2d 1040 (6th Cir. 1969); *Taylor* v. *Kentucky State Bar Association*, 424 F. 2d 478, 481 (6th Cir. 1970); *In re Stivers*, 292 N. E. 2d 804, 808 (Ind. 1973); *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F. 2d 169 (3rd Cir. 1971).

The underlying reasons for this Court's decision that disbarment proceedings are criminal or quasi-criminal in nature are clearly explained in *Erdmann* v. *Stevens*, 458 F. 2d 1205 wherein the Court noted:

> ". . . *in our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding.* A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. *However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine . . .* Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment — loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and his client re-

> lations as well as adversely affect his ability to carry out his professional functions . . . *Undoubtedly these factors played a part in leading the Supreme Court (of the United States) to characterize disbarment proceedings as being 'of a quasi-criminal nature'* (citing *In re Ruffalo, supra*). (Emphasis supplied).
>
> ". . . the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights . . . a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights . . ." (Emphasis supplied).

The language in *Erdmann, supra*, is neither novel nor is it confined to modern application. The West Virginia Supreme Court of Appeals, in 1947, twenty-five years prior to the *Ruffalo* and *Erdmann* decisons, set clear precedent and applied the common sense approach to the nature of disbarment proceedings. Accordingly, in *In re Damron*, 131 W. Va. 66, 45 S. E. 2d 741 (1947), that Court, per Justice Haymond, held that:

> "The disbarment of an attorney from practicing in the court which orders it and the manifestly more severe action or annulling his license to practice his profession in all courts are fraught with grave disaster for him who experiences either misfortune. *Each takes from him his customary means of earning a living for himself and his dependants. Each deprives him of a valuable professional right or privilege and destroys his professional standing. Each removes him from the sphere of conduct for which by training and experience he is best fitted and forces him to seek a different kind of activity in which he is inexperienced and for*

> *which ordinarily he is not properly qualified. Even in other types of work the stigma of his past unfitness remains and operates as a handicap in his efforts to succeed . . .*" (Emphasis supplied).

Thus, it can be clearly seen that a disbarment proceeding has all the effect and consequences of a criminal prosecution. In fact, the very section of the State Bar Rules under which respondent herein proceeds refers to these proceedings as "prosecutions" and parties thereto as "the accused".

Petitioner does not deny that one purpose of any disbarment or disciplinary proceeding is to protect the public and the courts to a degree. However, as held in many cases, the defendant in such proceedings is entitled to the protections afforded by the Constitution of the United States. The true test of the nature of disciplinary proceedings lies not in the label attached to such hearings but rather the test should be one which measures the consequences and results of the final outcome upon the convicted defendant.

A disbarment is a drastic action and is punishment levied against the accused attorney in the strictest sense. In *Lantz* v. *The State Bar*, 212 Cal. 213, 298 Pac. 497 (1931), the California Supreme Court not only called disbarments a punishment but also spoke of their "deterrent" effect:

> ". . . In our opinion, this conduct of the petitioner clearly involved moral turpitude and dishonesty on his part. It would therefore, demand an order of disbarment were it not for certain mitigating circumstances which the evidence shows should, in fairness to all parties, be taken into consideration in *meeting out just*

> *punishment to the accused . . . petitioners conduct should mitigate the punishment which this court is vested with the power to mete out to him.*
>
> "Under all of the facts and circumstances of this case, we do not feel justified in imposing upon him the extreme measure of our power and to deprive him permanently of his right to practice law. *We are satisfied that a lesser punishment would more justly meet the situation . . . we have decided that a years' suspension of the petitioner from the practice of law would be adequate punishment to be inflicted upon him, and will be a sufficient deterrent to others who might in the future be tempted to commit similar transgressions.*" (Emphasis supplied).

The only logical extension of these cases leads to the conclusion that the petitioner herein is immune from any disciplinary proceedings against him which are based upon compelled testimony before the grand juries. West Virginia Code, 57-5-2, prohibits the use of compelled testimony, which tends to criminate the witness, in "any proceeding against him." Standing alone, Code 57-5-2, would bar a disciplinary proceeding.

In re Ming, 469 F 2d 1352, questioned whether or not a disciplinary proceeding, grounded upon an attorney's conviction of a crime could be instituted prior to the exhaustion of defendant's appeal attempts. The Court in *Ming* cited *In re Ruffalo*, 390 U.S. 544, as controlling the defendant's right to constitutional due process. In concluding that a disbarment is a punishment or penalty imposed upon a lawyer the court went on to state the reason why due process must be afforded attorneys in these proceedings:

> "... *licenses to practice law ... can be viewed as a type of 'new property'* ... the deprivation of which has drastic consequences to the individual. It is only fair and just that the Government not subject any person to such a drastic divestment without affording him *substantial due process of law* ..." (Emphasis supplied).

Cf. Reich, *The New Property*, 73 Yale L. J. 733 (1964).

Simply stated, the petitioner herein should not have been prosecuted in this proceeding since he is immune from any prosecution based upon his compelled testimony. The nature of a disciplinary action prosecuted against an attorney is by its own consequences a "criminal" procedure contemplated by immunity law.

"A disbarment proceeding is quasi-criminal in character and, although it is not essential that the guilt of the accused be established beyond a reasonable doubt, nevertheless his guilt must be established by convincing proof to a reasonable certainty." *Furman* v. *State Bar of California, supra.* Thus, it can be clearly seen that even within the confines of the rules of "evidentiary weight", disbarment proceedings smack of criminal requirements as to the sufficiency of evidence. Note the following language from a recent West Virginia case:

> "In order to sustain a disciplinary charge against an attorney the evidence must be full, preponderating and clear ... It is also true that all proper intendments are in favor of the attorney, and *reasonable doubts or conflicts in the evidence should be resolved in his favor ...*" *The Committee on Legal Ethics of the W. Va.*

State Bar v. *Lewis*, ____ W. Va. ____, 197 S. E. 2d 312 (1973). (Emphasis supplied.)

These are criminal requirements not comparable to the "preponderation only" test used in civil cases. Again, it is apparent that the nature of disciplinary hearings, being criminal in character, cannot be hidden beneath generalized statements labeling them "civil". For decades, courts in this country were labeling juvenile proceedings as "civil"; however, in recent years the Supreme Court of the United States and the West Virginia Supreme Court of Appeals have adopted the common sense approach which recognizes the adversary character and obvious criminal consequences of such proceedings. *Cf. In Re Gault*, 387 U. S. 1, 33, 87 S. Ct. 1428, 1446, 18 L. Ed. 2d 527, (1966). Thus, the loss of a professional right, reputation and ability to earn a living demonstrate beyond a doubt that disbarment is indeed a penalty not to be imposed without strict adherence to requirements of due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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207 Security Building
Charleston, West Virginia 25301

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of November, 1973, the following order was made and entered, to-wit:

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, *Complainant*

13396

vs.

PHILIP JAMES GRAZIANI, *Defendant*

The Court having maturely considered the verified complaint praying for the annulment of the license to practice law of Philip James Graziani, together with the original Report of the Committee on Legal Ethics, as provided by Part C, Article VI of the By-Laws, Rules and Regulation of the West Virginia State Bar and certain papers and documents being Findings and Recommendation of the Committee on Legal Ethics; exhibits Nos. 1 to 7, inclusive, the record and transcript of the formal hearing held on May 3, 1973; and, defendant's motion to dismiss the statement of charges and his answer to said charges and exhibits therewith; the rule awarded thereon; the answer with exhibits of the defendant, Philip James Graziani; and upon the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that the defendant, Philip James Graziani, has been guilty of a crime involving moral turpitude, and his

license to practice law in the State of West Virginia should be annulled.

Accordingly, it is therefore adjudged and ordered that the license and authority of the defendant, Philip James Graziani, to practice law in the State of West Virginia, be, and the same is hereby revoked and annulled.

The syllabus of points adjudicated, prefixed to the written opinion *Per Curiam*, was concurred in by Justices Berry, Caplan, Haden, Sprouse and Neely.

The Clerk of this Court is hereby directed promptly to certify a copy of this order to the Secretary of The West Virginia State Bar, pursuant to Section 32 of Article VI of the By-Laws of The West Virginia State Bar, and a duly attested copy of this order shall be mailed to the defendant, with return receipt requested, and to counsel of record in this proceeding.

A True Copy

Attest: George W. Singleton
Clerk Supreme Court of Appeals

APPENDIX B

No. 13396

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

v.

PHILIP JAMES GRAZIANI

Disciplinary Proceeding — License to practice law annulled

PER CURIAM

1. It is generally held that immunity statutes apply only to criminal prosecutions.

2. Disbarment proceedings are neither civil actions nor criminal prosecutions but are special proceedings which are peculiar in their nature.

3. Testimony or evidence given by an attorney under a grant of immunity with regard to testimony before a grand jury can be used in disbarment proceedings against the attorney.

4. Bribery and conspiracy to commit bribery are crimes that involve moral turpitude and warrant the disbarment of any attorney guilty of such crimes.

Per Curiam:

This is a proceeding for disciplinary action instituted by the Committee on Legal Ethics of the West Virginia State Bar pursuant to the authority conferred by Part D, Article VI of the By-Laws of the West Virginia State Bar. The defendant, Philip James Grazi-

ani, a licensed attorney and member of the West Virginia State Bar, was charged with professional misconduct by the Committee on Legal Ethics. The verified complaint alleges that the defendant combined and conspired with others to commit bribery and did bribe James Frederick Haught, a Federal Housing Commissioner of West Virginia. Thus, the Committee on Legal Ethics contends that the defendant's license to practice law should be annulled. On July 20, 1972 this Court issued a rule directing the defendant to appear and show cause why his license to practice law should not be annulled. On September 19, 1972 the case was submitted for decision upon briefs and oral arguments on behalf of the respective parties.

It appears from the pleadings that in the latter part of 1969 the defendant, after several conferences with law enforcement officials, volunteered to testify before the Grand Jury of Kanawha County and was assured that no statements he made would be used against him. On December 10, 1969 the defendant was summoned to appear before the Grand Jury of Kanawha County and testified after the Intermediate Court of Kanawha County entered an order granting defendant "* * * full and complete immunity from prosecution under Federal or State law * * *."

On August 5, 1971 the defendant appeared before a grand jury of the United States District Court for the Southern District of West Virginia and testified to the effect that C. Donald Robertson and Dana Aubrey Robertson had conspired to bribe and did bribe James Frederick Haught. Subsequently, C. Donald Robertson, Dana Aubrey Robertson, and James Frederick Haught were indicted for violating Section 201, Title

18 of the United States Code (bribery of a public official) and Section 1952, Title 18, United States Code (interstate transportation in aid of racketeering enterprises). All three subsequently pleaded guilty, were fined and imprisoned.

The Committee on Legal Ethics was subsequently informed that the defendant had testified before the federal grand jury about his own participation in the bribery conspiracy. On February 12, 1973 the Committee filed a petition in the United States District Court for the Southern District of West Virginia seeking disclosure of the grand jury minutes with respect to the testimony of the defendant and one Arthur J. Tarley. Over the objection of the defendant's attorney, the United States District Court ordered the United States Attorney to provide the Committee on Legal Ethics with the requested transcript of testimony.

After reviewing the grand jury testimony, the Committee on Legal Ethics informed the defendant that a formal hearing would be held. The hearing was held on May 3, 1973 and defendant's attorney appeared on behalf of the defendant and objected to the use of the grand jury transcript, contending the defendant had been granted immunity from any and all proceedings against him and thus his testimony could not be used by the Committee on Legal Ethics. Counsel for the defendant stated that no evidence would be offered on behalf of the defendant and that the defendant would rely solely on his immunity defense to the charges against him. The Committee overruled the defendant's motion to dismiss the statement of charges against him on the grounds that the use of defendant's

federal grand jury testimony did not violate his constitutional right against self-incrimination.

The defendant's testimony before the federal grand jury revealed that the defendant represented Centurion Corporation, a construction company. The president of Centurion Corporation, Arthur J. Tarley, and a Federal Housing Director, James Frederick Haught, entered into an arrangement in which Tarley would pay Haught a $50 "finder's fee" for each apartment unit constructed by Centurion Corporation. Tarley informed the defendant of this arrangement and it was agreed that Tarley would forward funds to the defendant for the so-called "finder's fee" and the defendant would pass the funds on to Haught. On six separate occasions over approximately 16 months, the defendant gave Haught $18,700 in cash that had been sent to the defendant by Tarley. The defendant was also aware of another $12,500 that was given to Haught by the defendant's law partner, Dana Aubrey Robertson, which sum was drawn out of the partnership account of the law firm.

The Committee concluded from the testimony that the defendant was engaged in bribery and thus he was guilty of professional misconduct and his license to practice law should be annulled. A petition was then filed in this Court to annual the defendant's license to practice law.

The question involved in the instant case is whether the testimony of an attorney given before the grand jury under a grant of immunity can be used in a disbarment proceeding against the attorney. It is generally held that immunity statutes apply only to criminal prosecutions. *Ullmann* v. *United States*, 350 U.S.

422, 76 S.Ct. 497, 100 L.Ed. 511; *Zuckerman* v. *Greason*, 285 N.Y.S.2d. 1, 231 N.E.2d 718; *In Re Schwarz*, 51 Ill.2d. 334, 282 N.E.2d 680; *State* v. *Simon*, 132 W.Va. 322, 52 S.E.2d 725; *State* v. *Abdella*, 139 W.Va. 428, 82 S.E.2d 913.

It is true that the West Virginia cases cited above, *Simon* and *Abdella*, involved criminal prosecutions. However, in connection with the matter the Court stated in the *Abdella* case: "The Legislature, in our opinion, intended by the enactment of Code, 57-5-2, to give to a witness who is required to testify or produce evidence of a self-criminating nature an immunity from a criminal prosecution which is based in any way upon the self-criminating evidence, an immunity which is coextensive with the privileges which the witness would have under the Fifth Amendment to the Constitution of the United States, and Article III, Section 5, of the Constitution of West Virginia, were it not for the enactment of the statute. * * *."

It is the contention of the defendant that a disbarment proceeding is a criminal proceeding, and, therefore, the testimony of the defendant given before the federal grand jury cannot be used in this proceeding to disbar him. We have found no cases that hold that disbarment proceedings are criminal proceedings. If disciplinary proceedings were held to be criminal proceedings then the Legal Ethics Committee of the State Bar, where such cases are initiated, would have the burden of proving beyond a reasonable doubt the issues involved and the case would have to be tried by a jury. It has been held that the evidence must be full, prepondering and clear in disciplinary actions, and not beyond a reasonable doubt. *Committee on Legal Ethics*

v. *Lewis*, W.Va. , 197 S.E.2d 312. It is true that one case decided by the Supreme Court of the United States, *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117, indicated that disbarment proceedings were quasi-criminal proceedings and held that an attorney is entitled to procedural due process in disbarment proceedings. However, a quasi-criminal proceeding does not mean it is a criminal proceeding, and, in fact, this Court held in the case of *In Re Brown*, W.Va. , 197 S.E.2d 814, that such proceedings are neither civil actions nor criminal prosecutions but that such proceedings are special proceedings which are peculiar in their nature.

It is also the contention of the defendant that the immunity statute, Code, 57-5-2, applies not only to criminal but also to civil actions as well, because it states that such self-criminating testimony or evidence shall not be used in "any proceeding". We are of the opinion that the statute applies only to any criminal proceeding because the immunity statutes in many states are broader than in this state and typically provide that the immunity applies where there is any type of penalty or forfeiture involved. But it has been held in those states with such broad immunity statutes that the immunity applies only to criminal proceedings. *In Re Rouss*, 221 N.Y.81, 116 N.E. 782, (Cert. denied 246 U.S. 661, 38 S.Ct. 332, 62 L.Ed. 927); *Ullmann* v. *United States*, *supra*.

It has been repeatedly held that testimony or evidence given by an attorney under a grant of immunity could be used in disbarment proceedings against the attorney. *In Re Biggers*, 24 Okla. 842, 104 P. 1083; *In Re Rouss*, 221 N.Y. 81, 116 N.E. 782; *The Florida Bar* v.

Massfeller, (Fla.) 170 So.2d 834; *In Re Farrell*, 27 A.D.2d 61, 276 N.Y.S.2d 61; *In Re Schwarz*, 51 Ill.2d 334, 282 N.E.2d 689. The case of *In Re Rouss* was decided by Judge Cardozo in 1917 before he was elevated to the Supreme Court of the United States. The facts are on all fours with the case at bar and Judge Cardozo held that immunity from any penalty or forfeiture as provided by the immunity statute in New York did not apply to disbarment proceedings within the meaning of the immunity statute and stated in that case that: "* * * We will not declare, unless driven to it by sheer necessity, that a confessed criminal has been intrenched by the very confession of his guilt beyond the power of removal [from the Bar]."

In the case of *The Florida Bar* v. *Massfeller, supra*, decided in 1964, it was held that where an attorney admitted to his misconduct he could not rely on the immunity statute in a subsequent disbarment proceeding. The Florida Court, in that case, said: "We hold that it was not the intent of the legislative act granting immunity from 'prosecution, penalty or forfeiture' to immunize members of the Bar from disciplinary proceedings or punishment instituted or imposed by or under authority of rules of this Court, for a contrary opinion would recognize the power and purpose of the Legislature to abridge or curtail the constitutional power of this court as part of a coordinate and equal branch of the government of this state. The Constitution of this state vests exclusive jurisdiction over the admission and discipline of attorneys at law in this Court and authorizes it to exercise such jurisdiction through delegation of authority to the circuit courts and district courts of appeal, or by commissioners of members of the Bar, subject to this court's supervision and review.

* * *." See Article VIII, Section 1 of the Constitution of West Virginia and Code, 51-1-4a, as amended, for such powers in this State.

In the case of *In Re Schwarz, supra*, decided in 1972, it was held that the immunity statute in Illinois extended only to criminal prosecutions and that disbarment proceedings, based on an attorney's testimony after he had been granted immunity at the trial of a judge whom he had bribed, did not violate the attorney's rights under the Fifth Amendment.

The defendant relies on the case of *Spevack* v. *Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574. That case merely held that an attorney could not be disbarred for refusing to produce documents in a judicial inquiry into professional misconduct of an attorney. It was contended by the respondent attorney in the *Schwarz* case that the holding in the *Spevack* case was applicable to disbarment proceedings and that testimony given under a grant of immunity could not be used in such proceeding. The Court in that case stated that such interpretation of the *Spevack* case was entirely too broad and allowed such testimony under a grant of immunity to be used in a disbarment proceeding.

It was held in the case of *Anderson* v. *Coulter*, 16 Ariz. App. 27, 490 P.2d 856, where the immunity statute stated that a witness compelled to testify could not be prosecuted or subjected to any penalty or forfeiture, the term penalty or forfeiture was restricted to penalties or forfeitures in a criminal proceeding and that the immunity statute had no effect on subsequent civil sanctions against the witness.

The record in this case indicates that the defendant was granted immunity by the Intermediate Court of

Kanawha County with regard to his testimony before the grand jury of said court, apparently for violations of the laws of the State of West Virginia, and there is no indication that he was granted immunity by the United States District Court when he testified before the grand jury of that Court, which related to bribery and conspiracy to commit bribery of a federal employee or officer which was not a crime against the State of West Virginia. However, the testimony arose out of the testimony the defendant gave before the grand jury of the Intermediate Court of Kanawha County and it has been held that such grant of immunity must afford protection and extend to federal proceedings. *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678.

The testimony before the federal grand jury which is made a part of the record in this proceeding clearly shows that the defendant was guilty of bribery and conspiracy to commit bribery. It has been repeatedly held that such crimes are crimes that involve moral turpitude which warrant the disbarment of any attorney guilty of such crimes. *In re Barron*, W.Va. , 181 S.E.2d 273; *In re Dana Aubrey Robertson* and *In re C. Donald Robertson*, W.Va. , 194 S.E.2d 650; *In re Brown*, W.Va. , 197 S.E.2d 814. Thus, the testimony of the defendant in this case before the grand jury amounts to a confession of guilt of a crime involving moral turpitude and warrants the disbarment of the defendant. *In Re Rouss, supra; In Re Schwarz, supra.*

For the reasons stated herein, the defendant's license to practice law is annulled.

License to practice law annulled.

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of December, 1973, the following order was made and entered, to-wit:

THE COMMITTTE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, *Complainant*
13396

vs.

PHILIP JAMES GRAZIANI, *Defendant*

The petition for rehearing and reargument filed in this proceeding having been maturely considered, a majority of the Court is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Justice Neely would grant.

A True Copy

Attest: George W. Singleton
Clerk Supreme Court of Appeals

APPENDIX D

IN THE INTERMEDIATE COURT OF
KANAWHA COUNTY

In Re:)
Grand Jury)
September Term)

ORDER

Comes now the State of West Virginia by Patrick Casey, the Prosecuting Attorney in and for Kanawha County, West Virginia, and comes Philip Graziani in person and by his attorney pursuant to motion to compel testimony filed on behalf of the State of West Virginia pursuant to West Virginia Code, Chapter 57, Article 5, Section 2, and the affidavit filed in support of said motion. It is represented unto the Court inter alia by the said Prosecuting Attorney of Kanwaha County that the aforementioned Philip Graziani has refused to give any testimony before the grand jury, claiming his various consitutional rights under the United State Consitution and the West Virginia Constitution and their Amendments. The Court after hearing statements of counsel and argument of the State of West Virginia does hereby find that the ends of justice will be promoted by compelling the said Philip Graziani to testify regarding the various matters being investigated by said grand jury and if necessary give evidence that may incriminate him or tend to incriminate him and therefore it is hereby ORDERED that the said Philip Graziani is hereby compelled to answer all questions and to testify and produce such documents as he may have relative thereto before the

grand jury which was impaneled in Kanawha County Intermediate Court on the 10th day of November, 1969.

And it is further ORDERED that the said Philip Graziani shall have complete legal immunity in regard thereto as the law provides and said Philip Graziani is hereby granted full and complete immunity from prosecution under Federal or State laws insofar as the matters being investigated by said grand jury are concerned, and insofar as any testimony he gives incriminates or tends to incriminate said Philip Graziani, and it is further ORDERED that as a result of such testimony and/or production of records said Philip Graziani shall not be prosecuted or subjected to any penalties or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify and said testimony shall not be used as evidence in any proceedings against the said Philip Graziani in any Court either State, Federal or otherwise.

It is further ORDERED that nothing contained in this order shall limit or waive the rights of the said Philip Graziani or any immunity which the said Philip Graziani may have under other provisions of law.

ENTER:

George W. Wood
Judge

Date: December 10, 1969
Presented by:
Patrick Casey

APPENDIX E

AFFIDAVIT

The undersigned, Patrick Casey, having been duly sworn, doth depose and say that:

He is the Prosecuting Attorney for Kanawha County, West Virginia and was duly qualified in acting as such during the months of November and December, 1969, and previous thereof. That on or about the month of December, 1969, the undersigned had a conference with Philip J. Graziani and his then attorney, together with Charles L. Hughes, a Member of the Department of Public Safety of West Virginia and John T. Coyne, Investigator for the Purchasing, Practices and Procedures Committee of the State of West Virginia.

That during such conference with Mr. Graziani, and his then attorney, Mr. Graziani volunteered to furnish certain information that would aid and assist the State of West Virginia and the United States Government Authorities in investigations. Definite promises were made to Mr. Graziani by the undersigned as well as Charles L. Hughes and John T. Coyne that nothing said or furnished of any evidentiary nature by Mr. Graziani concerning State or United States crimes would be used against Mr. Graziani in any way, shape or form. That Mr. Graziani would be given immunity by the Intermediate Court of Kanawha County, West Virginia with respect to such information and that no evidentiary matters traceable to such statements and evidence would be held against Mr. Graziani. In particular, assurances were made to Mr. Graziani that no

penalty or forfeiture or civil obligations would arise by reason of the information furnished by him.

Afterwards Mr. Graziani was summoned to appear before the Grand Jury of Kanawha County, West Virginia, and was compelled to give evidence after an order of immunity was signed by the Court. As a direct result of Mr. Graziani's testimony before the Kanawha County Grand Jury, evidence was obtained. Later the evidence given to said state Grand Jury was furnished to Mr. Warren Upton, United States Attorney for the Southern District of West Virginia and after said testimony by Mr. Graziani the United States Attorney for the Southern District of West Virginia caused a United States Investigation to be made wherein the Federal Bureau of Investigation assisted in the same.

Afterwards said Philip J. Graziani was summoned to appear before the United States Grand Jury held for the Southern District of West Virginia and such grand jury evidence given to the United States District Court, the undersigned was informed and is informed that the Legal Ethics Committee of the State Bar of West Virginia asked to examine the Grand Jury minutes. The undersigned, Prosecuting Attorney considers that because said information stemmed from a grand jury proceeding by said Kanawha County Grand Jury, which said grand jury matters were Ordered by the Judge of the Intermediate Court to remain secret, and that such exposure of such minutes at this time would violate the spirit of the Order of the Intermediate Court of Kanawha County, West Virginia, entered on December 10, 1969, and the assurances given to said

witness by the Judge of the Intermediate Court, Prosecuting Attorney of Kanawha County, West Virginia and other officials.

[Signature] Patrick Casey

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Sarah Sheer, the undersigned Notary Public in and for the County and State aforesaid, whose commission expires on the 8th day of September, 1981, do hereby certify that Patrick Casey whose name is signed to the foregoing Affidavit personally appeared before me in my County and State aforesaid, this 15th day of March, 1973 and acknowledged the same.

GIVEN under my hand and seal this 15th day of March, 1973.

[Signature] Sarah Sheer
Notary Public

AFFIDAVIT

John T. Coyne, being first sworn, deposes and says:

From February 26, 1969 to June 30, 1970 I served as Chief Investigative Attorney for the Purchasing Practices and Procedures Commission. During the months of November 1969 to February 1970 I had occasion to work with Phillip Graziani in furtherance of the work of the PPPC.

When I first met Phillip Graziani it was in the office of an attorney who sought a commitment from the Staff Director that nothing Mr. Graziani might say in an attempt to cooperate with the PPC would be used to harm him in any way, whether by means of state criminal prosecution, federal criminal prosecution or other administrative action. Such a commitment was made by the Staff Director and reinforced by representations made by myself and Cpl. C. L. Hughes of the West Virginia State Police to Phillip Graziani. These commitments were to the general effect that we intended to grant Phillip Graziani the fullest possible immunity from criminal prosecution, whether state or federal, obtainable at law in return for his cooperation. The representations also involved assurances to Phillip Graziani that the records of the PPC were confidential and not discoverable by any other state agency for any purpose. Subsequent to these representations and as a consequence of them, Mr. Graziani was granted immunity by order of the Intermediate Court of Kanawha County, West Virginia.

Based upon his reliance upon these representations and the order of the Court, Phillip Graziani provided information of significant value to the PPC and the Grand Jury of Kanawha County. It is noteworthy that at the time of his cooperation, Phillip Graziani was not in jeopardy of any criminal prosecution and that his cooperation was complete and continuous. The most featured aspect of his cooperation involved the information he provided to a federal grand jury. That information was initially developed in the State Grand Jury and then proferred to the federal government by the undersigned at the express direction of Mr. Grazi-

ani and subject to the same representations and assurances of the fullest immunity pertaining thereto for the stated purpose of clearing up a situation that was destructive of the entire federal housing program in West Virginia. This situation was not only not known but not even suspected at the time and but for Mr. Graziani's help it might still exist.

In my experience with many witnesses from every segment of West Virginia public and private life Phillip Graziani's cooperation stands out as the most complete and continuing encountered in my year and a half's work in West Virginia.

If a personal opinion is in order, I believe that Mr. Graziani's cooperation was more prompted by a commitment to remedying a corrupt situation than that of any witness I encountered. It seems very undesirable to have administrative punishment meted out to a man whose recent conduct has been of great value to the State of West Virginia while there are others of far greater involvement who remain untouched by a disciplinary action because they chose to not cooperate in the state and federal investigative efforts.

[Signature] John T. Coyne

STATE OF WEST VIRGINIA

COUNTY OF FAIRFAX

I, Carolyn B. Laws, the undersigned Notary Public in and for the County and State aforesaid, whose commission expires on the 16th day of March, 1975, do hereby certify that John T. Coyne whose name is signed to the foregoing Affidavit, personally appeared

before me in my County and State aforesaid, this 13th day of March, 1973 and acknowledged the same.

GIVEN under my hand and seal this 13th day of March, 1973.

[Signature] Carolyn B. Laws
NOTARY

AFFIDAVIT

The undersigned, Charles L. Hughes, after being first duly sworn, deposes and says that:

1. He is a Member of the West Virginia Department of Public Safety and since February of 1969, has been assigned as a Special Investigator with the Purchasing, Practices and Procedures Commission of the State of West Virginia.

2. Acting in that capacity and with John T. Coyne, the Chief Investigative Attorney with the Commission and Patrick Casey, the Prosecuting Attorney of Kanawha County, West Virginia, in the months of November and December, 1969, conferences were had with Philip J. Graziani concerning information sought by the above named persons and the affiant.

3. As a result of these conferences Mr. Graziani volunteered certain information after being assured by affiant and the other aforesaid persons in the presence of his then attorney that nothing said or furnished by Mr. Graziani would be used against him in any manner whatsoever and for any purpose. More specifically, affiant and these other officials specifically assured Mr. Graziani that any information given would

remain confidential and that he would be immune from any penalty and forfeiture of any nature.

4. Based upon these assurances Mr. Graziani was granted immunity and testified before the Grand Jury of the Intermediate Court of Kanawha County, West Virginia.

5. Thereafter, affiant Mr. Graziani met with Special Agent Thomas Hughes of the Federal Bureau of Investigation, at Mr. Hughes' request. Prior to the interview of Mr. Graziani, Agent Hughes started to give Mr. Graziani a "Miranda" warning at which time affiant told Agent Hughes that such a warning was not consistent with the agreements and promises previously made to Mr. Graziani by affiant and other officials, that no warnings had ever been given to Mr. Graziani by affiant or anyone else and none were required at that time. Accordingly, no warnings were given to Mr. Graziani by Agent Hughes.

And further affiant sayeth not at this time.

[Signature] Charles L. Hughes

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Sarah Sheer, the undersigned Notary Public in and for the County and State aforesaid, whose commission expires on the 8th day of September, 1981, does hereby certify that Charles L. Hughes, whose name is signed to the foregoing Affidavit, personally appeared

before me in my County and State aforesaid, this 15th day of March, 1973 and acknowledged the same.

Given under my hand this 15th day of March, 1973.

[Signature] Sarah Sheer
Notary Public

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of the attorneys for the petitioner, and a member of the Bar of The Supreme Court of the United States, hereby certify that, on the 15th day of March, 1974, I served three copies of the foregoing Petition for a Writ of Certiorari on the respondent by depositing same in a United States mail box, with postage prepaid, addressed to counsel of record for the Respondent, John O. Kizer, Esquire, 1200 Charleston National Plaza, Charleston, West Virginia 25301. I further certify that all parties required to be served have been served.

Leo Catsonis

Leo Catsonis
207 Security Building
Charleston, West Virginia 25301

Of Counsel for Petitioner

LIBRARY
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Supreme Court
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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1403

PHILIP JAMES GRAZIANI,
Petitioner,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID A. FABER
JOHN O. KIZER
1200 Charleston National Plaza
Charleston, West Virginia 25301
Counsel for Respondent

Of Counsel:
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Charleston, West Virginia 25301

April 12, 1974

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1403

PHILIP JAMES GRAZIANI,
Petitioner,

v.

THE COMMITTEE ON LEGAL
ETHICS OF THE WEST
VIRGINIA STATE BAR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia is reported unofficially at 200 S.E. 2d 353 and is included in the Petition as Appendix B.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the testimony of an attorney given before a grand jury under a grant of immunity may be used as evidence in a disbarment proceeding against him.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the single statute involved (Chapter 57, Article 5, Section 2, West Virginia Code, 1931, as amended) are set forth in the Petition at pp. 3-4.

STATEMENT OF THE CASE

The petitioner, Philip James Graziani, was licensed to practice law in the State of West Virginia on June 3, 1953. On November 20, 1973, upon the complaint of the Committee on Legal Ethics of the West Virginia State Bar, respondent herein, the Supreme Court of Appeals of West Virginia issued the opinion below annulling petitioner's license to practice law. The salient facts in the chain of events leading to petitioner's disbarment are as follows.

On December 10, 1969, petitioner voluntarily testified before the Grand Jury of Kanawha County, West Virginia pursuant to an order of the Intermediate Court of Kanawha County granting him "* * * complete legal immunity thereto as the law provides and said Philip Graziani is hereby granted full and complete immunity from prosecution under Federal or State laws * * *." (The full text of the grant of immunity is included in the Petition at p. A-14 as Appendix D.) It is uncontradicted that the grant was extended to petitioner pursuant to West Virginia Code, §57-5-2, the text of which may be found in the Petition at pp. 3-4.

Some twenty months after testifying before the Kanawha County Grand Jury as aforesaid, the petitioner, on August 5, 1971, appeared before a grand jury of the United States District Court for the Southern District

of West Virginia and testified that C. Donald Robertson, a former Attorney General and candidate for Governor of West Virginia, and Dana Aubrey Robertson, his brother, had conspired to bribe and did bribe James Frederick Haught who, at the time, was serving as Federal Housing Commissioner of West Virginia. Thereafter, C. Donald Robertson, Dana Aubrey Robertson and James Frederick Haught were indicted for violating Section 201, Title 18 of the United States Code (bribery of a public official) and Section 1952, Title 18, United States Code (interstate transportation in aid of racketeering enterprises.) All three pleaded guilty, were fined and imprisoned. In a subsequent proceeding the licenses to practice law of the Robertsons were annulled. A more detailed account of the facts concerning the Robertsons' guilty pleas and the subsequent annulment of their licenses to practice law is contained in *In re Robertson*, W.Va. , 194 S.E. 2d 650 (1973).

The Committee on Legal Ethics of the West Virginia State Bar learned of petitioner's testimony before the federal grand jury from statements in the public press and statements of the United States Attorney made in open court at the arraignment of the Robertsons. Believing from such statements that petitioner may have been involved in the bribery scheme to which the Robertsons and Haught had pleaded guilty, the Committee, on February 12, 1973, filed a petition in the United States District Court for the Southern District of West Virginia to obtain disclosure of the federal grand jury testimony of petitioner and one Arthur J. Tarley, who had also given testimony leading to the indictments of the Robertsons and Haught. Over the objection of petitioner's counsel the United States District Court granted disclosure of the testimony of petitioner and Tarley.

After reviewing the grand jury testimony the Committee on Legal Ethics determined to bring charges against petitioner and duly served him with such charges and with notice of a formal hearing to be held before the Committee on such charges. The formal hearing was held on May 3, 1973.

It is important to note that the grand jury testimony of Arthur J. Tarley was considered by the Committee only in its investigative role prior to bringing charges against petitioner. The Court must not be misled by statements in the Petition suggesting that Tarley's testimony was used as evidence against petitioner. (See, for example the second paragraph on page 12 of the Petition.) At no point was Tarley's testimony used as evidence to support or justify the charges against petitioner; the record makes this abundantly clear. Tarley's testimony was not used at the formal hearing before the Committee of the charges against petitioner and it was not introduced into evidence in the proceedings before the Supreme Court of Appeals of West Virginia which resulted in petitioner's disbarment.

At the formal hearing before the Committee petitioner's attorney appeared and objected to the use of the grand jury transcript of petitioner's testimony contending that the grant of immunity extended to petitioner was broad enough to foreclose a disbarment proceeding. When given the opportunity to present evidence in petitioner's behalf counsel for petitioner declined, stating that the petitioner would rely solely on his immunity defense to the charges against him. Petitioner's motion to dismiss based on such ground was denied by the Committee.

Petitioner's own testimony before the federal grand jury as considered by the Committee and duly of record

in this case reveals the following facts: During 1968 and part of 1969 petitioner was engaged with Dana Aubrey Robertson in a partnership for the practice of law known as Graziani & Robertson. One of the clients of Graziani & Robertson was Centurion Corporation, a construction company. The President of Centurion Corporation was Arthur J. Tarley. Tarley and James Frederick Haught, who was then Federal Housing Director of West Virginia, entered into an arrangement whereby Tarley would pay Haught a "finder's fee" of fifty dollars for each apartment unit Centurion was employed to construct on federally-funded projects. In return for this money Haught was to use his official position and influence to direct contracts and federal funds to Centurion Corporation. Tarley informed petitioner of this arrangement and it was agreed that Tarley would forward the "finder's fees" to petitioner who would then personally deliver them to Haught in cash. The payments would thus be disguised as legal fees paid by Centurion to petitioner.

On six separate occasions over a period of approximately sixteen months, petitioner passed a total of $18,700.00 in cash to Haught. The money was passed in various clandestine meetings at various places including the lobby of a Charleston, West Virginia, office building and at least once in a parked automobile. Petitioner was also aware of additional payments totalling $12,500.00 delivered to Haught by the petitioner's law partner, Dana Aubrey Robertson; the source of this $12,500.00 was the partnership account of Graziani & Robertson.

At the close of the formal hearing the Committee on Legal Ethics concluded that petitioner had been engaged in bribery and conspiracy to commit bribery and was thus guilty of professional misconduct. Accordingly,

the Committee, following appropriate West Virginia procedure, filed a complaint in the Supreme Court of Appeals of West Virginia seeking annulment of petitioner's license to practice law. After a full hearing, including submission of briefs and oral argument, petitioner was disbarred. (The order annulling petitioner's license to practice law is attached to the Petition at p. A-2 as Appendix A.)

ARGUMENT

This case presents but one issue and that issue is itself an old question heretofore resolved correctly in all its ramifications. Try as petitioner may to find various unresolved constitutional problems lurking in this case and try as he might to present the matter in a fresh light the true nature of this case cannot be disguised. The sole question presented is this: Can the former testimony of an attorney given under a grant of immunity be used as evidence in a subsequent disbarment proceeding against him?

I.

THE DECISION BELOW IS CLEARLY CORRECT

The Petition, in taking the position that Philip Graziani's federal grand jury testimony cannot be used against him in a disbarment proceeding, makes essentially three arguments based on the Constitution of the United States, all of which have been previously resolved and none of which requires or justifies review by this Court. Petitioner asserts that he was compelled to be a witness against himself in violation of the Fifth Amendment; he charges that he was denied his Sixth Amendment right to confront the witnesses against him; and he maintains the proceedings below were so lacking in the "basic rudiments of fair play" that they constituted a denial of due

process of law contrary to the Fourteenth Amendment. None of these arguments has merit.

A. The Fifth Amendment Argument

During the past half-century many courts have weighed the propriety of using an attorney's former testimony, given under a grant of immunity, as evidence in a disbarment proceeding against him. The fountainhead case is a 1917 opinion written by Justice Benjamin Cardozo who was then a Judge of the Court of Appeals of New York. In that case, *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917), cert. den. 246 U.S. 661, 38 S.Ct. 332, 62 L.Ed. 927 (1918), an opinion typically remarkable both for the logic of its reasoning and the lucidity of its prose, Judge Cardozo held that the constitutional privilege against self-incrimination applies only to criminal proceedings. A "proceeding looking to disbarment" was held not to be a criminal case.

In re Rouss has been often followed in subsequent cases. Respondent, rather than engage in a tedious review of such cases, directs the Court to *In re Schwartz*, 51 Ill. 2d 334, 282 N.E. 2d 689 (1972), cert. den. 409 U.S. 1047, 93 S.Ct. 527, 34 L.Ed.2d 499 (1972), reh. den. 410 U.S. 917, 93 S.Ct. 959, 35 L.Ed.2d 281 (1973), to illustrate the continuing vitality of the principles enunciated in *Rouss*.

In addition to making the Fifth Amendment argument rejected in the line of cases exemplified by the *Rouss* and *Schwartz* decisions, petitioner has contended that West Virginia Code, §57-5-2, pursuant to which the grant of immunity here involved was extended to petitioner, is broad enough to confer immunity from "administrative," as well as criminal, proceedings. This, however, is not a question of federal constitutional law—it is a matter of

statutory construction properly committed to the courts of West Virginia for resolution. Accordingly, the Supreme Court of Appeals of West Virginia, in the opinion below and in prior cases there cited, has ruled that §57-5-2 authorizes grants of immunity from criminal prosecution only. Such statutes so construed have been repeatedly held constitutional. The decisions illustrate that the Fifth Amendment protection extends only to criminal prosecutions. The fact that a witness might be subject to non-criminal disabilities or liabilities as a result of testimony given under a grant of immunity does not render the immunity inadequate. Such risks, not of a criminal nature, do not fall within the Fifth Amendment's guaranty against self-incrimination. *Ullmann* v. *United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), reh. den. 351 U.S. 928, 76 S.Ct. 777, 100 L.Ed. 1457 (1956).

The opinion below is one of many cases which follow the reasoning of the *Rouss* and *Schwartz* decisions. It correctly holds that the Fifth Amendment (and the West Virginia immunity statute) applies only to criminal prosecutions and that a disbarment proceeding is not a criminal prosecution.

B. The Sixth Amendment Argument

The only possible basis for petitioner's argument that he was denied the right to confront the witnesses against him is his suggestion, completely unsupported by the record, that the grand jury testimony of Arthur J. Tarley was used as evidence against him. The respondent Committee did obtain disclosure of Tarley's testimony, but never was such testimony used in any way as evidence to support the Committee's action. It was not introduced into evidence at the Committee hearing of the charges

against petitioner and it was not used in any capacity in the proceeding before the Supreme Court of Appeals of West Virginia which resulted in annulment of petitioner's license to practice law. It is elementary that the constitutional right of confrontation is the right of a person to confront and cross-examine witnesses who present evidence against him. At no time has Tarley been a witness against petitioner—at no time has Tarley's testimony been used as evidence against petitioner. Petitioner's contention that he was denied the right to confront Tarley is therefore without merit.

C. The Due Process Argument

The several-stranded rope with which petitioner seeks to bind his Petition together is the assertion that the proceedings against him were so lacking in "the basic rudiments of fair play" as to constitute a denial of due process of law. This fundamental fairness argument is woven throughout the Petition. Although petitioner points to at least four aspects of this case as denying him due process, his fundamental fairness argument does not stand up under scrutiny.

First, petitioner asserts that he was found guilty of a felony although never charged, indicted or tried for his alleged offenses. This is patently ridiculous. Petitioner was found to have admitted under oath his own complicity in a bribery scheme. It was determined that this complicity constituted professional misconduct requiring annulment of his license to practice law. He was not adjudged guilty of any crime nor was any criminal penalty or punishment imposed upon him. Petitioner's clever attempt to disguise the proceedings against him by describing them in terms appropriate only to a criminal case cannot obscure their true nature. Disbarment

proceedings have been repeatedly held to be neither civil proceedings nor criminal prosecutions, but are special proceedings, peculiar to themselves. Although some detriment will necessarily accrue to the attorney involved, a disbarment proceeding is not for the purpose of punishment but to protect the public and the courts from unfit practitioners. *Ex parte Wall*, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1882).

The second element of petitioner's due process argument is that, although West Virginia Code, §57-5-2, authorizes grants of immunity from criminal prosecution only, the particular immunity conferred upon him pursuant to that statute was broader than the statute itself and renders him immune to disbarment proceedings as well as to criminal prosecutions. In support of his contention he cites the wording of the grant of immunity extended to him by the Intermediate Court of Kanawha County, West Virginia, and he has submitted affidavits of various investigative agents who contend that an immunity broad enough to cover disbarment proceedings was intended. (The grant of immunity is included in the Petition at p. A-14 as Appendix D; the investigating agents' affidavits are included in the Petition collectively as Appendix E beginning on p. A-16 thereof.)

An examination of the grant of immunity itself does not support petitioner's contention. It is clear that the Intermediate Court of Kanawha County intended to act within the authority conferred by the statute—the grant states that Philip Graziani "shall have complete legal immunity * * * *as the law provides* * * *." (emphasis supplied)

Additionally, it is clear that the Intermediate Court, even if it had intended to grant an immunity broader than the statute contemplates, would lack the authority

to confer such a grant. Furthermore, the affiants, if they promised petitioner a broader grant, were acting beyond their authority in so doing. The grant of immunity is a creature of statute. The statute authorizes immunity from criminal prosecution only. Surely it cannot be maintained that investigative agents, acting beyond their statutory authority, can by such acts restrict the power of the respondent Committee to bring charges against attorneys guilty of professional misconduct or restrict the authority of courts to discipline attorneys.

It will be noted that petitioner is a lawyer and had highly competent legal counsel available to assist him. He could read for himself the immunity statute and cases construing it as well as the line of cases holding that former testimony given under a grant of immunity may be used as evidence in disbarment proceedings. There is no reason to believe he did not testify with full knowledge of the possible consequences. The assertion that he was "trapped" into believing he enjoyed a privilege he did not receive is thus without merit.

Petitioner's third contention to support his assertion that he was denied due process is that, by using his own grand jury testimony against him, the burden of proof was somehow shifted to him requiring him to prove his own innocence. This theory is not developed in the Petition although it is asserted therein. In reply, respondent merely points out that petitioner has never questioned or attempted to rebut the facts which are in evidence. His own testimony clearly reveals what he himself did. He has been given every opportunity to explain or rebut such testimony, but has steadfastly refused to do so.

The Supreme Court of Appeals of West Virginia has consistently held, as it did in the opinion below, that to sustain a disciplinary charge against an attorney the

evidence must be full, preponderating and clear. (This test, it may readily be seen, lies somewhere between the preponderance test applied in civil cases and the reasonable doubt standard of the criminal law and is thus a further indication that a disbarment is neither a civil nor a criminal case but a special type of proceeding.) By obtaining the best evidence available—petitioner's own account of what he himself did—and properly introducing it into evidence the Committee has, without question, complied with its burden of proof and shown petitioner guilty of professional misconduct.

The fourth element of petitioner's due process argument is that the character of a disbarment should be determined not by its nature but by its effect, that the effect of the proceeding against petitioner was punishment as in a criminal case, and therefore his disbarment proceeding was a criminal proceeding. None of the cases cited by petitioner in support of this ingenious argument is apposite on its facts to the case at bar. In none of the cases cited by petitioner is a disbarment held to be purely criminal either in nature or effect—the most any of these cases holds is that such a proceeding is quasi-criminal in nature. The word "quasi" means "resembling" or "seemingly but not actually." See the Random House Dictionary of the English Language (unabr. ed. 1967). Thus, a proceeding cannot be criminal and quasi-criminal at the same time. To say a disbarment proceeding is quasi-criminal is merely to state in a different way the general rule established in the *Rouss-Schwartz* line of cases, discussed above—that disbarment proceedings are neither civil actions nor criminal prosecutions but are "special proceedings, peculiar to themselves."

Petitioner's claims that he was "misled" or "unfairly treated" fly in the face of the facts. Petitioner's own

admissions more than satisfy the evidentiary test. What better evidence can there be than Philip Graziani's own account of what he himself did? Additionally, petitioner was given the opportunity at the formal hearing held by the Committee on the charges against him to present evidence in rebuttal to his own grand jury testimony. He declined to do so. His own testimony is uncontradicted—the evidence that he was involved with C. Donald Robertson and Dana Aubrey Robertson in a conspiracy to bribe James Frederick Haught and that he passed money to Haught on various occasions in furtherance of this sordid scheme is uncontradicted.

The disciplinary action taken by the Supreme Court of Appeals of West Virginia in this case is fully supported and justified by the gravity of petitioner's admitted misconduct. Consider the fate of the others involved in the bribery of Haught. Haught and both Robertsons have been fined and imprisoned. The Robertsons have also had their licenses to practice law annulled. Disbarment of petitioner, even if considered to be punishment, leaves him untouched by the criminal convictions, the fines and the imprisonment imposed on those who acted in concert with him. Petitioner has been duly rewarded for cooperating with law enforcement officials, else he too would be today in prison.

II.

THERE IS NO CONFLICT OF DECISION

The Petition devotes several pages to a lengthy discussion of Florida cases which, it is argued, represent a "modern view" distinct from the line of cases following *In re Rouss*, supra. (See pages 12 through 24 of the Petition.) Although petitioner does not openly assert that these cases are in conflict with decisions from other jurisdictions, such a conclusion seems to be implicit in his

argument. An examination of the Florida cases, however, does not bear this out. In fact, Florida law, although it deviates in cases involving practitioners of other professions, is firmly in line with the majority viewpoint when it comes to lawyers.

In *Florida State Board of Architecture* v. *Seymour*, 62 So. 2d 1 (Fla. 1952), the Supreme Court of Florida held that a proceeding to revoke an architect's certificate was a prosecution to effect a penalty or forfeiture under the Florida immunity statute. When the question subsequently arose as to whether the former testimony of an attorney could be used as evidence against him in a disbarment proceeding the Florida Court distinguished the *Seymour* case and held that an attorney's former testimony could be used against him. That case, *Florida Bar* v. *Massfeller*, 170 So. 2d 834 (Fla. 1964), specifically followed Justice Cardozo's opinion in *In re Rouss*, supra. *Florida State Board of Architecture* v. *Seymour* was distinguished as having no application to a disbarment proceeding. The following statement of the Florida Court in the *Massfeller* case found at 170 So. 2d 834, 838-839, leaves no doubt as to the state of the law in Florida:

> "* * * [W]e hold that Sec. 932.29 [the Florida immunity statute] has no applicability to members of the Florida Bar and that respondent cannot cloak himself with immunity from such a [disbarment] proceeding by virtue of the provisions of such statute. In so holding we find ourselves in accord with the decisions of the highest courts of appeal of other states, for it is uniformly held that immunity statutes of the character of Sec. 932.29 do not extend to disciplinary proceedings by courts of members of the Bar."

The other Florida cases cited by petitioner do not change or restrict the ruling in *Massfeller*. *Lurie* v.

Florida State Board of Dentistry, 288 So. 2d 223 (Fla. 1973), in which petitioner takes great comfort, merely held that a dentist could not have his license to practice revoked on the basis of former testimony given under a grant of immunity. The *Mansfield* case was not overruled or distinguished or even mentioned in *Lurie*; there is not the slightest suggestion in *Lurie* that the ruling of that case (itself a controversial "four to three" decision by a sharply divided court) is meant to apply to lawyers.

The most that can be drawn from the Florida cases is that Florida holds attorneys to stricter standards than are applied to practitioners of other professions, and such a distinction is warranted, for lawyers are officers of the courts in whose hands rests much of the responsibility for the administration of justice.

Even if the Florida law were inconsistent with cases such as *In re Hinds*, supra, and *In re Schwartz*, supra, it would merely represent a minority viewpoint completely out of step with general law and in no way binding upon the courts of West Virginia.

CONCLUSION

The Petition contains much citation of authority and is replete with skillfully contrived arguments designed to put old wine in a new bottle. Not one case cited, however, holds that the former testimony of an attorney given under a grant of immunity is inadmissible as evidence against him in a disbarment proceeding. On the contrary, numerous cases, of varying vintage, hold that such testimony can, consistent with constitutional protections, be used to support an attorney's disbarment. The law on the question involved in this case is clear and settled and has been for many years.

Respondent respectfully submits that the decision below is clearly correct; that it is fully consistent with established law; that it is just and fair and violates none of petitioner's constitutional rights. The public interest and the honor and dignity of the legal profession compel that attorneys who use their professional positions to engage in bribery and conspiracy to commit bribery no longer be permitted to practice law and hold themselves out to the courts and to the public as professionally and ethically qualified.

Accordingly, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. FABER
JOHN O. KIZER
Counsel for Respondent

April 12, 1974

PROOF OF SERVICE

I, John O. Kizer, one of the attorneys for the Committee on Legal Ethics of the West Virginia State Bar, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of April, 1974, I served copies of the foregoing Brief for Respondent in Opposition on Philip James Graziani, the petitioner, by mailing three copies thereof in an envelope duly addressed, with first class postage prepaid, to his attorneys of record Leo Catsonis and Thomas L. Linkous, 207 Security Building, Charleston, West Virginia 25301.

It is further certified that all parties required to be served have been served.

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